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No. 92-1189

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE COLUMBUS MUSEUM OF ART IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE COLUMBUS MUSEUM OF ART IN SUPPORT OF PETITIONER

The Columbus Museum of Art hereby moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. Counsel for the petitioner has consented to the filing of this brief; counsel for the respondents have refused consent.

Founded in 1878, the Columbus Museum of Art is the oldest art museum in Ohio, housing over 6,000 objects from the Western artistic tradition. The world premier of deep-ocean photography as a new form of art took

place at the Columbus Museum of Art in the summer of 1992, during the exhibit *Shipwreck!*. Exhibited alongside the deep-ocean photography were artifacts and treasures retrieved from the *S.S. Central America*. *Shipwreck!* included a "time capsule room" that displayed a number of artifacts recovered from the shipwreck that helped give visitors a picture of life in 1857. The room included clothing, jewelry, dishes, bottles, an 1857 newspaper, cigars, luggage tags and much more.

The undersea photographic images, historical documentation and incredibly well-conserved artifacts that Columbus-America Discovery Group provided to the Columbus Museum of Art during the summer of 1992 provided a rare and wonderful opportunity to educate thousands of vistors about the evolving synthesis of art and science. Museum professionals understand, perhaps better than others, how truly rare this opportunity was. The museum was presented with a group of experienced collectors, conservators and curators, together with an intact collection, carefully conserved by a single entity—Columbus-America Discovery Group.

New developments in underwater photography and cinematography involving the use of deep-diving robots with advanced cameras and lights have produced vivid images of the beauty of the ocean floor, thus enabling marvelous exhibits such as *Shipwreck!*. While photographs of shipwreck sites are often taken to aid explorers, the photographs themselves often emerge as the real treasure. *William J. Broad, Deepest Wrecks Now Visible to Undersea Cameras*, N.Y. Times, Feb. 2, 1993, at B3, B6.

It is estimated that more than 1,000,000 ships have been lost to the seas during recorded history. George F. Fichter, *The Future Sea* 55 (1978). There are literally thousands of long-lost shipwrecks serving as time capsules of ancient civilizations. "It is probable that a greater number of monuments of the skill and industry

of man will in the course of ages be collected together in the bed of oceans, than will exist at any one time on the surface of the Continents." *The Sea Remembers* (Peter Throckmorton ed., 1987) at 226. Therefore, the proper exploration, discovery, and recovery of shipwreck sites must be encouraged and cultivated.

If the decision below is allowed to stand, it may well herald the end of the type of multidisciplinary efforts in which Columbus-America Discovery Group has been an innovator, with artists and scientists creating and working side-by-side to safeguard the vast historical and artistic material lying on the ocean floor.

For these reasons, the Court should grant this motion for leave to file the attached brief *amicus curiae* in support of the petitioner.

Respectfully submitted,

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QUESTION PRESENTED

May admiralty courts continue to infer abandonment of long-lost shipwrecks from the passage of many decades, non-use, and all other relevant facts and circumstances, and accordingly award ownership of a shipwreck to those who discover, recover and conserve it under the law of finds; or must courts award title to purported insurers and their successors who claim ownership of a shipwreck under the law of salvage on grounds that abandonment can never be found absent clear and convincing evidence that the purported owners expressly renounced title?

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BRIEF AMICUS CURIAE OF THE COLUMBUS MUSEUM OF ART IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The Columbus Museum of Art is the oldest art museum in Ohio, housing over 6,000 objects from the Western artistic tradition. In addition to maintaining and expanding its diverse collection, the museum offers films, a regular speaker series, summer jazz concerts, an active volunteer program, and a photography council. Millions of Americans, from all states, have enjoyed the aesthetic and entertainment offerings of the Columbus Museum of Art since the museum's founding in 1878.

Because museums are the most active buyers in the international art market, they seek to acquire high quality works that capture the public's interest. The world premier of deep-ocean photography as a new form of art took place at the Columbus Museum of Art in the summer of 1992. Exhibited alongside the deep-ocean photography were artifacts and treasures retrieved from the *S.S. Central America*. The exhibition of the photographs and artifacts from the *S.S. Central America* has proven to be among the Columbus Museum of Art's most fascinating, widely-viewed, and memorable collections, but the Fourth Circuit Court of Appeals' decision presents a novel legal impediment to the continuation of such exhibits. Because the Columbus Museum of Art seeks to foster the continued inspiration of artists in every imaginable medium, and is profoundly troubled by the Court of Appeals' shift of burdens of proof to the finders, creators and doers in our nation, it respectfully asks the Court to review the decision below.

THE PETITION FOR CERTIORARI SHOULD BE GRANTED

I. THE DECISION BELOW HARMS OCEAN PHOTOGRAPHY, CINEMATOGRAPHY, OPPORTUNITIES FOR ARTISTIC EXPRESSION AND THE WIDESPREAD ENJOYMENT OF THE DEEP SEA

A. New Advances in Technology Have Increased Opportunities for Self-Expression in the Fine Arts in the Deep Sea and Provided Vast Material of Creative Value

As we move toward the twenty-first century, the traditional definitions of art and science are beginning to change. The days when paintings, drawings, etchings and sculpture were considered the only "art" are long past. Photography and cinematography, which began as mechanical methods for simply mirroring reality, have become rich art forms. Henry Talbot, an early pioneer

in the field of photography, saw photography as a form of art which merged the worlds of art and science and provided "a multitude of minute details which add to the truth and reality of the representation, but which no artist would take the trouble to faithfully copy from nature." Thomas B. Allen, *Capturing the Image, in* Inventors and Discoverers: Changing Our World 154 (National Geographical ed., 1988). Cinematography has also experienced an evolution from a purely media form to a powerful art form. "Born as a way to preserve reality, photography evolved into an art that, in the movies, produced illusions." *Id.* at 151.

In the twentieth century, photography and cinematography have become foremost mediums in our visually-oriented culture. At the same time, these mediums have developed as a unique means of artistic expression and a vital art form. Today, photography and cinematography are often recognized as the artistic mediums that best address the nature of our time.

New developments in underwater photography and cinematography involving the use of deep-diving robots with advanced cameras and lights, have produced vivid images of the beauty of the ocean floor. The technology to photograph the ocean floor has been used by explorers to document the discovery of shipwreck sites. This technology has already been used to photograph the images of the *Titanic*, the Nazi battleship *Bismarck*, the 1812 warship *Hamilton*, a fourth-century Roman merchant vessel, an American dirigible from the 1930's lost to the seas, a German U-boat, a sunken Douglas Dauntless bomber, 14 wrecks from the battle of Guadalcanal in World War II and the *S.S. Central America*. William J. Broad, *Deepest Wrecks Now Visible to Undersea Cameras*, N.Y. Times, Feb. 2, 1993, at B3, B6. While photographs of shipwreck sites are often taken to aid explorers, the photographs themselves often emerge as the real treasure. *Id.* at B6. A Toronto effort recently cre-

ated a three-dimensional feature-length movie utilizing new technologies for undersea photography that opened in Canada to rave reviews. *Id.* Similarly, the Columbus Museum of Art successfully exhibited its collection of photographs and film from the shipwreck of the *S.S. Central America.*

Continuing progress in the new development of underwater photographic gear promises to bring us even more dramatic pictures from the deep sea. *Id.* Along with their intrinsic beauty, as revealed by the art of underwater photography, shipwrecks also provide us with a unique opportunity to take advantage of photography and cinematography to look back into the lives of those who lived before us. The study of historic shipwrecks gives historians a valuable insight into trade, shipboard life, and the interaction between the Old and New Worlds in the exploration and settlement of this country. U.S. Congress, Office of Technology, *Technologies for Underwater Archaeology and Maritime Preservation-Background Paper*, OTA-BP-E-37, 8 (1987).

As cultural resources, shipwrecks provide valuable information about the historic changes in vessels, warfare and commerce. *The Sea Remembers* 226 (Peter Throckmorton ed., 1987). We learn about history and culture from shipwrecks through their cargoes, such as the utensils and other artifacts of daily life that the passengers carried and that sank with them, including plates, glassware, cutlery and clothing. *Id.* "From the Bronze Age to the Titanic, deepwater archaeology will throw a powerful searchlight onto the past, using sophisticated salvage techniques." *Id.* at 222. As such, shipwrecks can be understood "as potential museums." *Id.* at 226.

It is estimated that more than 1,000,000 ships have been lost to the seas during recorded history. George F. Fitcher, *The Future Sea 55* (1978). There are literally thousands of long-lost shipwrecks serving as time capsules of ancient civilizations. "It is probable that a

greater number of monuments of the skill and industry of man will in the course of ages be collected together in the bed of oceans, than will exist at any one time on the surface of the Continents." *The Sea Remembers*, *supra*, at 226. Therefore, the proper exploration, discovery, and recovery of shipwreck sites must be encouraged and cultivated. However, if the decision below is allowed to stand, it may well herald the end of the type of multidisciplinary efforts in which Columbus-America Discovery Group has been an innovator, with artists and scientists creating and working side-by-side to safeguard the vast historical and artistic material lying on the ocean floor.

B. Long-Lost Shipwreck Sites Provide a Unique Opportunity to Advance Art, History, and Education

Columbus-America Discovery Group provided the Columbus Museum of Art with the unique opportuntiy to display an intact collection of material from the shipwreck of the *S.S. Central America*. In the summer of 1992, the Columbus-America Discovery Group provided the museum with an exhibit that combined art, science, history, and exploration into a truly powerful experience that awakened the artistic and scientific spirit in everyone.

Shipwreck!, the museum's exhibit, contained 194 remarkable artifacts and images, including contemporary woodcuts, steamship and passenger artifacts, and other discoveries associated with the recovery of the *S.S. Central America*. *Shipwreck!* offered visitors the rare opportunity to view computers, laser disc players, and television monitors that allowed each person "to take part" in the discovery and exploration of the *S.S. Central America*. The addition of 3-D cinematography and photographs allowed the visitors to experience the shipwreck site as it existed more than a mile and a half below the surface.

The travelers aboard the *S.S. Central America* during her final voyage represented a multi-cultural cross-section

of 19th-century life in our nation. A "time capsule room" at the exhibit displayed a number or artifacts recovered from the shipwreck that helped give visitors a picture of life in 1857. The room included clothing, jewelry, dishes, bottles, an 1857 newspaper, cigars, luggage tags and much more. In the time capsule room, a single small case displayed several handfuls of gold dust and nuggets, representative of the gold that inspired thousands of Americans to risk their lives and fortunes to explore the new frontier. The result: dramatic westward expansion of our nation.

The Columbus Museum offered an equally rare opportunity as part of the *Shipwreck!* exhibition by presenting public lectures by academicians who were part of the discovery of the *S.S. Central America.* The exhibit of the material from *S.S. Central America* more than tripled the attendance for the museum's best previous summer exhibit and it was held over for an additional two weeks in September 1992, allowing hundreds of students to experience the beauty and excitement of the shipwreck.

II. THE PRACTICAL EFFECT OF THE DECISION BELOW WILL BE THE DIVISION OF HISTORIC SHIPWRECKS INTO A MULTIPLICITY OF OWNERSHIP CLAIMS, THEREBY DISRUPTING AND DISINTEGRATING THE HISTORIC, CULTURAL AND ARTISTIC VALUE OF SHIPWRECK SITES

In applying the law of finds, the admiralty courts have established the threshold requirement that the finder act in good faith to protect the scientific, historic and archaeological values of the shipwreck. In stark contrast, the courts have no power to impose such a requirement on an alleged owner. The alleged owner, acting either directly or through contract salvage, may do whatever it desires with its property, without regard to the destruction of the scientific and historic values of shipwrecks. Indeed, insurers typically handle salvage on a "no cure, no pay" basis; salvors are compensated solely for salvaging the

insurers' alleged property—not for protecting others' interests. *See, e.g., Florida Dep't of State v. Treasure Salvors, Inc.*, 558 U.S. 670, 713 n.11 (1982). *See also Clarke v. The Steamship Elfrida*, 172 U.S. 186, 192 (1898) (recognizing an early form of the "no cure, no pay" contract); *Sea Lift, Inc. v. Refinadora Costarricens de Petroleo, S.A.*, 792 F.2d 989, 992 (11th Cir. 1986) (noting that "no cure, no pay" is "the most widely used salvage contract in the world"); *Alva Steamship Co. v. City of New York*, 616 F.2d 605, 610 (2nd Cir. 1980) (stressing that "no cure, no pay" "is standard in the salvage trade"). As a practical matter, the majority opinion makes it impossible to prove abandonment of, and to quiet title to, ocean resources, and therefore subjects these historic sites to the often destructive law of salvage. The opinion will allow claims of ownership scores of years old to cloud title to property found at sea and subject historic shipwrecks to a multitude of fractional claims.

A. The Decision Below Disrupts the Essential Integrity of the Artistic, Historic and Educational Attributes of Shipwreck Sites

The undersea photographic images, historical documentation and incredibly well-conserved artifacts Columbus-America Discovery Group provided to the Columbus Museum of Art during the summer of 1992 provided a rare and wonderful opportunity to educate thousands of visitors about the evolving synthesis of art and science. Museum professionals understand, perhaps better than others, how truly rare this opportunity was. The museum was presented with a group of experienced collectors, conservators and curators, together with an intact collection, carefully conserved by a single entity—Columbus-America Discovery Group.

More often, when trying to display a large and representative collection of the work of an artist or a period, museum professionals face difficult barriers. Often, a

body of work has become dissipated, spread out among hundreds of owners. The *Shipwreck!* exhibition, with its clear focus on images, imaging and imagining, was only possible because the shipwreck had been so carefully recovered, conserved and maintained by a single entity. The rarity and wonder of the *Shipwreck!* exhibition became even clearer in August, 1992, when the Fourth Circuit Court of Appeals ruled that another integral part of the shipwreck, the treasure, was to be divided among numerous insurance companies (which had done nothing whatsoever to find or locate it and had contributed not a penny to assist the effort). The decision below jeopardizes the possibility of any future museum exhibitions based on the unique historical and artistic value of recovered shipwrecks, and actively encourages the filing of numerous other stale claims in the future by descendents of passengers, crew members and others. If the Fourth Circuit's opinion is allowed to stand, it will place shipwreck collections out of the reach of all but the largest and most heavily endowed museums and rob the public of the opportunity to experience the beauty and excitement of a *Shipwreck!*.

B. The Decision Encourages Secretive Behavior By the Creators, Finders and Doers in Our Nation

The effect of the Fourth Circuit's opinion is obvious. It fosters secretive behavior. Those who work long and hard, and risk millions in venture capital to locate and recover long-lost shipwrecks are rewarded for their effort with a bevy of claims by those seeking a judicial windfall.

The finders and creators and doers who create value (artistic, historic, monetary, or otherwise) will face a Hobbesian choice: if they make the fruits of their labor public, they may face literally dozens of stale claims and the burden of defending costly and protracted litigation; if they conceal their behavior, the public will lose the enjoyment of their work, but they will at least be able to

keep the fruits of their effort. The law should not foster secretive conduct, but rather should promote the full enjoyment of the artistic, historic, and scientific value of each long-lost shipwreck.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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